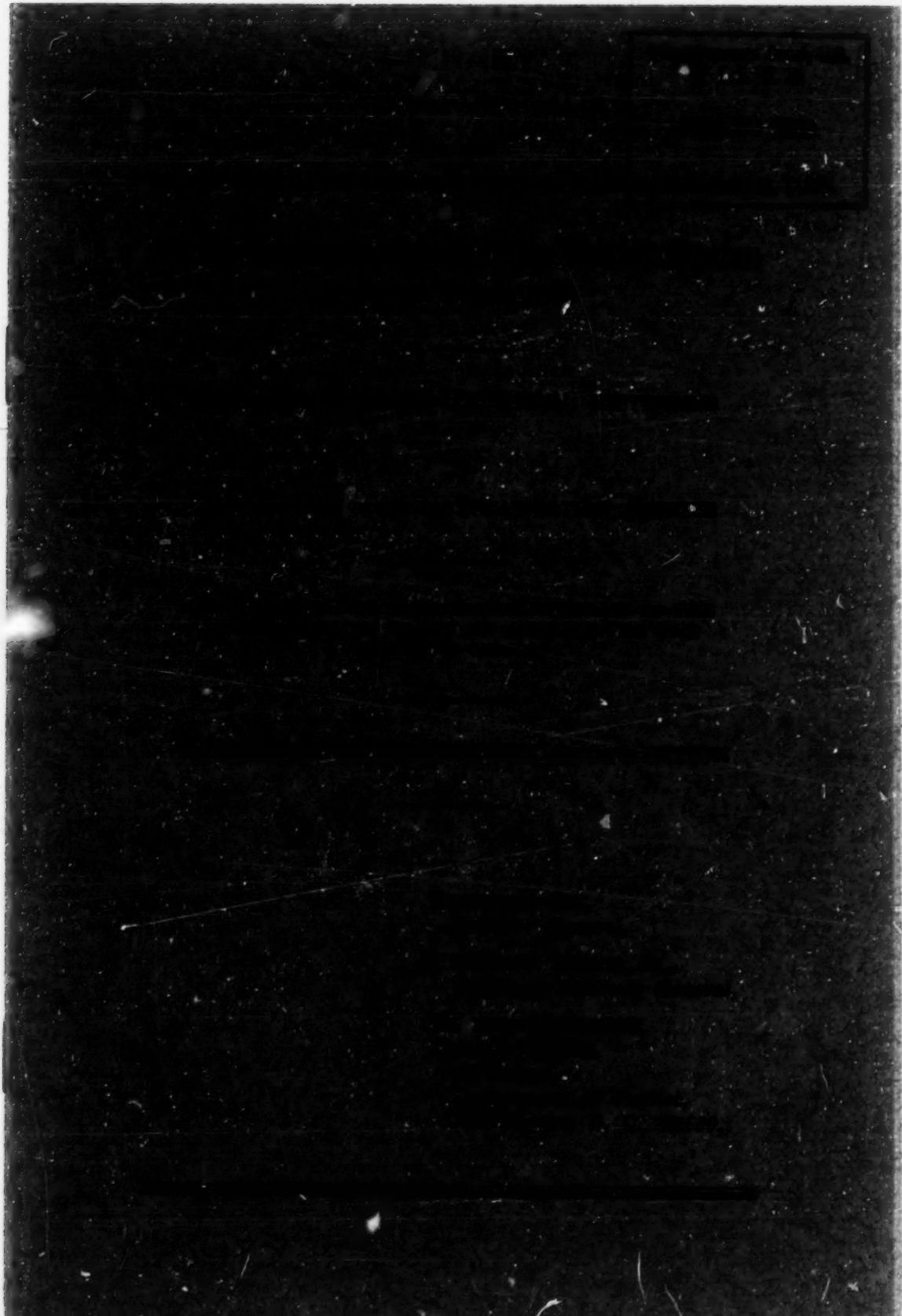

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute, rules and regulations involved	2
Statement	6
Argument	8
Conclusion	12

CITATIONS

Cases:

Foman v. *Davis*, 371 U.S. 178	11
Hulson v. *Atchinson T. & S. F. Ry. Co.*, 289 F. 2d 726, certiorari denied, 368 U.S. 835	11
Keohane v. *Swarco*, decided August 5, 1963, 32 U.S.L. Week 2091	10
Murra, Application of, 166 F. 2d 605	9
Raughley v. *Pennsylvania Railroad Co.*, 230 F. 2d 387	11
United States v. *Erie County*, 8 F.R.D. 493	10

Statute, rules and regulations involved:

Immigration and Nationality Act of 1952:	
Sec. 332(a) (8 U.S.C. 1443(a))	2, 9
Sec. 335 (d) (8 U.S.C. 1446(d))	2, 9
Sec. 336(a) (8 U.S.C. 1447(a))	3, 6, 9, 10
Sec. 336(b) (8 U.S.C. 1447(b))	3, 6, 9
Sec. 340(j) (8 U.S.C. 1451(j))	3, 9
Nationality Act of 1940, Section 310(b) (8 U.S.C. 710(b); now 8 U.S.C. 1430	6

Statute, rules and regulations involved—Continued — Page

Federal Rules of Civil Procedure:
Rule 6(b) 5, 11
Rule 15(a) 6, 11
Rule 50(b) 8
Rule 52(b) 5, 8, 9, 10, 11
Rule 58 10
Rule 59(b) and (e) 5, 8, 9, 10, 11, 12
Rule 73(a) 4, 8, 10, 11
Rule 81(a)(2) 9
8 C.F.R. 334.16(b) 4, 11

Miscellaneous:

7 Moore, *Federal Practice* (2d ed.), 81.05 p. 4436 .. 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 496

FREDERICK WILLARD THOMPSON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 318 F. 2d 681. The findings of fact and conclusions of law (R. 110) of the district court are reported at 209 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1963. On September 18, 1963, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September

27, 1963, and the petition was filed on September 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion to amend findings and judgment, or in the alternative to grant a new trial, made more than 10 days after the entry of the judgment of the court denying naturalization, tolled the running of time for appeal under Rule 73(a) of the Federal Rules of Civil Procedure.

STATUTE, RULES AND REGULATIONS INVOLVED

The pertinent sections of the Immigration and Nationality Act of 1952, as set forth in Title 8 of the United States Code, are as follows:

> §1443. (a) The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this Part and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. * * *
>
> §1446. (d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued. with reasons therefor. * * * The judge to whom such recommendationtions are submitted shall, if he approve

such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. * * *

§1447. (a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner and the witnesses, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court. * * *

(b) The requirement of subsection (a) of this section for the examination of the petitioner and the witnesses under oath before the court and in the presence of the court shall not apply in any case where an employee designated under section 1446(b) of this title has conducted the preliminary examination authorized by section 1446(b) of this title; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.

§1451. (j) Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within

the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action.

8 C.F.R. 334.16(b) provides:

> (b) *After final action on petition or application.* Whenever an application is made to the court to amend a petition or application for naturalization after final action thereon has been taken by the court a copy of the application shall be served upon the district director having administrative jurisdiction over the territory in which the court is located, in the manner and within the time provided by the rules of court in which application is made. * * *

The pertinent Federal Rules of Civil Procedure provide:

Rule 73(a):

> * * * When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for ap-

peal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Rule 52(b):

> * * * Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *

Rule 59:

> (b) * * * A motion for a new trial shall be served not later than 10 days after the entry of the judgment. * * *
>
> (e) * * * A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. * * *

Rule 6(b):

> * * * When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without mo-

tion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. * * *

Rule 15(a):

> * * * A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *

STATEMENT

Petitioner, a native and national of Canada, filed a petition for naturalization on August 28, 1946, under the provisions of Section 310(b) of the Nationality Act of 1940 (8 U.S.C. 710(b), now 8 U.S.C. 1430) (R. 7-8). On his motion for a *de novo* hearing pursuant to 8 U.S.C. 1447 the cause came before the United States District Court for the Northern District of Illinois on July 12, 1961 (Tr. 1). On April

18, 1962, the court denied the petition for naturalization. On the same day it entered findings of fact and conclusions of law which recited, *inter alia*, that petitioner had failed to establish his attachment to the principles of the Constitution (R. 110-122). *In Re Thompson's Petition*, 209 F. Supp. 494.

Twelve days later, on April 30, 1962, petitioner served notice on the Immigration and Naturalization Service that he would appear before the trial judge on May 2, 1962, and present a motion (R. 124). The motion, which requested the court "to amend certain findings of fact pursuant to Rule 52 F. R. C. P. and to grant a new trial pursuant to Rule 59 F. R. C. P."[1] (R. 125), was filed on May 2, 1962 (R. 125) heard on briefs (R. 131, 153, 171), and denied on October 16, 1962, (R. 191). On October 26, 1962, a second motion filed by petitioner asking the court to vacate its order of October 16, 1962 (R. 193) was filed and denied (R. 194).

On December 6, 1962, petitioner filed a notice of appeal (R. 195). On June 20, 1963, the court of appeals, on the government's motion, dismissed the appeal on the ground that notice of appeal had not been

---

[1] The motion, after requesting the amendment and striking of certain findings of fact entered by the trial court, concluded (R. 125):

"Therefore, the specific Findings of Fact in paragraphs 4 through 11 should be stricken and the Conclusions of Law should be amended so as to allow the petition for naturalization.

"The Court should therefore amend the Findings of Fact and Conclusions of Law and grant the petition or in the alternative, grant a new trial."

filed within the sixty-day period prescribed by Rule 73(a) of the Federal Rules of Civil Procedure and that petitioner's motion whether viewed as one for a new trial under Rule 59(b), or as one to alter or amend findings or judgment (under Rule 52(b) or 59(e)) was untimely and hence did not toll the running of the time for appeal. (Pet. App. A).

ARGUMENT

1. Petitioner does not question the applicability of Rule 73(a) of the Federal Rules of Civil Procedure to appeals in naturalization cases. Nor does he deny that, in the absence of a motion tolling the time for filing an appeal, his notice of appeal (filed on December 6, 1962, more than 60 days after the entry of the district court's order of April 18, 1962) would be untimely (*supra*, pp. 4-5). His contention is that the Federal Rules do not govern naturalization proceedings prior to the appellate stage, and hence that the filing of his post-trial motion to amend findings and judgment (or for a new trial), though not complying with the time limitations of Rules 52(b) and 59(b) and (e), nonetheless did toll the running of time under Rule 73(a). That argument, however, is wholly self-defeating. For, under Rule 73(a), the only post-trial motion which suspends the running of time for appeal is a "timely motion made pursuant to any of the rules hereinafter enumerated [Rules 50(b), 52(b) and 59]" and the time for appeal is to be computed from the entry of an order "made upon a timely motion under such rules." And, indeed, petitioner himself

specifically characterized his first motion as one made pursuant to Rule 52 and 59 of the Federal Rules of Procedure.

In any event, it is clear that the Federal Rules do apply to post-trial motions in naturalization proceedings. Rule 81(a)(2) provides that the Federal Rules govern enumerated proceedings (including "admission to citizenship"), but are "not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States * * *." See also 7 Moore, *Federal Practice* (2d ed.), 81.05, p. 4436. The obvious purpose of that Rule is to avoid a conflict between the procedure prescribed by the Federal Rules and that prescribed by statute. See *Application of Murra*, 166 F.2d 605, 606 (C.A. 7). None of the statutory provisions cited by the petitioner (8 U.S.C. 1443(a), 1446(d), 1447(a) and (b), 1451(j)[2]) sets forth a procedure for obtaining a new trial or an amendment of the findings or judgment, and hence none operates to displace Rules 52 and 59. On the contrary, the Rules complement the statutory provisions, as seems implicit in 8 U.S.C. 1451(j), which affirms the power of the court to correct or vacate its judgment "during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court * * *" (*supra*, pp. 3-4). There is no basis for believing that Congress intended to authorize post-trial motions in naturalization proceed-

---

[2] Secs. 332(a), 335(d), 336(a) and (b), and 340(j), of the Immigration and Nationality Act of 1952.

ings without regard to time limitations, a procedure which would indefinitely extend the time for filing an appeal.

2. There is no merit in petitioner's contention that, assuming the Rules do apply, the filing of his motions tolled the time for filing notice of appeal under Rule 73(a) since (1) such motions were served within ten days of receipt of notice of entry of judgment and (2) the trial court declared the motions were timely filed and the government voiced no objection as to timeliness.

Petitioner served notice on the 12th day after the entry of judgment that he would file a motion to amend findings of fact and conclusions of law, or in the alternative for a new trial. The motion was not actually filed until the 14th day. Since it was neither served nor filed within the 10-day period fixed by the rules, it was clearly out of time under the provisions requiring that it be "made" (Rule 52(b)) or "served" (Rule 59(b) and (e)) "not later than 10 days after entry of the judgment". Cf. *Keohane* v. *Swarco, Inc.* (C.A. 6), decided August 5, 63, 32 U.S.L. Week 2091. Under no circumstances can this be read as fixing the running of the time from the date of the receipt of notice of the entry of judgment. Cf. *United States* v. *Erie County*, 8 F.R.D. 493 (W.D. N.Y.). The term "entry of the judgment" has a definite meaning in the Rules (see Rule 58) and in the statutes governing naturalization cases (8 U.S.C. 1447(a), see p. 3, *supra*).

Neither the action of the court with respect to the motion, nor the failure of the government to object to

its timeliness, is of legal significance. Rule 6(b) of the Federal Rules of Civil Procedure (see p. 5, *supra*) does not permit the extension of time under Rules 52(b), 59(b) and (e) and 73(a). Opposing counsel could not waive the strict requirements of the rules fixing the time for filing post-trial motions *Hulson* v. *Atchinson T. & S. F. Ry. Co.*, 289 F.2d 726 (C.A. 7), certiorari denied, 368 U.S. 835. And the district court could not extend the time for appeal by entertaining and ruling on an untimely motion. *Raughley* v. *Pennsylvania Railroad Co.*, 230 F. 2d 387 (C.A. 3).

3. There is no occasion to consider whether a motion to amend the pleadings under Rule 15(a) of the Federal Rules suspends the running of time under Rule 73(a) and, if so, whether an application to amend a petition for naturalization (8 C.F.R. 334.16 (b), *supra* p. 4) would be deemed a Rule 15 (a) motion. No such application was filed here. What petitioner sought to have amended was not his petition for naturalization—the only document which might qualify as "his pleading" within the meaning of Rule 15(a)—but the findings and conclusions of the district court. As the court of appeals pointed out (Pet. 15), "Without favorable findings of fact, conclusions of law, and final order, or a new trial, the amendment of appellant's petition for naturalization would be futile."

The case of *Foman* v. *Davis*, 371 U.S. 178, is inapposite. There a specific request was made after judgment to amend the complaint to state an alternative theory forming a basis for favorable relief. The

motion to amend was accompanied by a timely motion to vacate the judgment under Rule 59(e), which unquestionably suspended the running of time for appeal and, indeed, rendered an earlier notice of appeal premature. This court held that the premature notice, together with a timely but ineptly drawn second notice, gave the court of appeals reason to treat the appeal as effective. That holding lends no support to the petitioner here, for in the present case there was no motion to amend the complaint and no timely notice of appeal.

CONCLUSION

The court below correctly held that it had no jurisdiction to determine petitioner's appeal on the merits. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

November 1963

U. S. GOVERNMENT PRINTING OFFICE, 1963 711937 400